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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of BLAIR R. and JILL P.
RICHARDSON.

BLAIR R. RICHARDSON,

Respondent,

v.

JILL P. RICHARDSON,

Appellant.

F075568

(Super. Ct. No. 10CEFL00399)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Rosemary T. McGuire, Judge.

McCormick, Barstow, Sheppard, Wayte & Carruth and Gary A. Hunt for Appellant.

William T. Thornhill for Respondent.

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Wife¹ Jill P. Richardson sought an order for enforcement of the provisions of the spousal support order entered in the parties' marital dissolution proceeding. The support order required husband Blair R. Richardson to pay wife a specified amount of monthly support, plus 30 percent of any bonuses he received. Wife contended certain payments husband received, referred to in his employment contracts as "annual incentive" or "incentive compensation," were bonuses subject to the support order. Husband contended they were not discretionary bonuses; rather, like his salary, they were guaranteed components of his compensation package. The trial court admitted extrinsic evidence regarding the intent of the parties to the employment contracts, and determined the payments were not bonuses, but part of husband's guaranteed compensation package. It denied wife's request for enforcement of the support order, and wife appealed. We conclude the contracts were susceptible to the meaning attributed to them by husband, extrinsic evidence was admissible to construe the terms of the contracts, and, in light of that evidence, the interpretation given to the contracts by the trial court was reasonable. Accordingly, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2011, in this marital dissolution proceeding, the trial court addressed the issue of spousal support. It took evidence regarding the parties' incomes and the relevant factors set out in Family Code section 4320. Husband's March 2011 income and expense declaration indicated that, in addition to his salary, he had the potential to earn an annual bonus. Based on the evidence, the trial court entered an order that husband pay wife spousal support of \$4,000 per month, plus 30 percent of any bonus he received.

In 2013, husband changed his place of employment, and began to work as president and chief executive officer of the National Potato Promotion Board, doing

¹ For convenience, we refer to the parties as husband and wife, although the judgment of dissolution terminated their marital status as of December 31, 2010.

business as Potatoes USA (NPPB), which he described as a trade organization governed by the United States Department of Agriculture (USDA). In September 2016, wife requested that the trial court enforce the existing spousal support order, contending husband failed to pay her 30 percent of the bonuses he received from his employment. In support, she presented husband's pay stubs from the NPPB, some of which reflected payments labeled "bonus" or "incentive."

In his response to wife's request for enforcement of the spousal support order, husband asserted he had not received any bonuses in the period since the 2011 support order. He explained that his compensation was broken down into monthly amounts and an annual amount, both of which were part of his negotiated, guaranteed salary. The board of directors set his compensation, both the monthly and the annual amounts, as part of the NPPB's budget; the USDA had to approve the budget. Performance bonuses were separate, not part of the budget, and had to be approved by the board, human resources, and the USDA before they could be paid. Husband never received a performance bonus. Annual incentive payments were part of his guaranteed compensation. On some of his pay statements, however, they were labeled "bonus" because the payroll software used at the time did not have a code to separate annual from monthly payments.

At the hearing of the request to enforce the spousal support order, the trial court admitted documentary evidence and oral testimony to aid it in interpreting husband's employment agreements with NPPB, to determine if any of the payments to husband were bonuses. The trial court concluded the "incentive" compensation referred to in husband's employment contracts was part of husband's guaranteed compensation package, and did not constitute a bonus. It determined wife was not entitled to 30 percent of any portion of husband's compensation package as "bonus" compensation under the support order. It denied wife's request to enforce payment of bonus income. Wife appeals from the denial of her request for enforcement.

DISCUSSION

I. Standard of Review

“The basic goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting.” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) “Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible.” (*Ibid.*) “The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine ‘ambiguity,’ i.e., whether the language is ‘reasonably susceptible’ to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is ‘reasonably susceptible’ to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract.” (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 (*Winet*).) This threshold determination of ambiguity, whether the language is reasonably susceptible to the meaning advanced by either party, is a question of law, which we review de novo. (*Ibid.*)

At the second step, determining the ultimate construction to be given to the ambiguous language, the standard of review depends upon whether there is a conflict in the extrinsic evidence. (*Winet, supra*, 4 Cal.App.4th at pp. 1165-1166.) “When the competent parol evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld as long as it is supported by substantial evidence.” (*Id.* at p. 1166.) If no parol evidence is introduced, or if it is not conflicting, construction of the instrument is a question of law, reviewable de novo. (*Ibid.*)

II. Determination that the contracts are ambiguous

Prior to trial of the bonus issue, wife filed a motion in limine to exclude extrinsic evidence offered to aid in the construction of the employment contract provisions relating to husband's compensation. She asserted husband intended to introduce evidence to show there was a distinction between the terms "bonus" and "incentive" as used in the compensation provisions of his employment contracts. She argued the contracts were unambiguous and the terms "bonus" and "incentive" were used interchangeably.

Husband responded to the motion, arguing the very fact wife contended the two terms had the same meaning revealed ambiguity. Additionally, the trial court should look to the circumstances surrounding the making of the contract and the parties' subsequent conduct to determine their intent concerning the meaning of the terms used. The trial court denied the motion in limine, concluding it needed to receive any proffered extrinsic evidence relevant to show the contract was reasonably susceptible to the particular meaning urged by either party before making any decision regarding ambiguity or meaning. Wife does not challenge that ruling.

Husband entered into three employment contracts with the NPPB.² The first contract was contained in a June 19, 2013 letter offering husband employment with the NPPB. It set out his salary, an annual amount to be paid in monthly installments, then provided:

"Annual Incentive: First year incentive to be paid at six month anniversary and at the end of the year guaranteed at \$134,800 total. Additional bonus compensation may be paid based upon mutually-agreed performance objectives."

² No issue was raised regarding whether husband received any bonus from his prior employer after the support order was entered.

The second contract was dated April 1, 2015. Section 2.1 of that contract, under the heading “**Base Compensation**,” set out husband’s annual salary, and provided it was payable in monthly installments. Section 2.2 provided:

“**Incentive Compensation.** In addition to the compensation to be paid pursuant to Section 2.1, Employee shall be paid additional, incentive compensation for the term hereof in addition to the base compensation not to exceed [\$139,518]. The specific amount of incentive compensation to be paid shall be based upon the evaluation of Employee by the Executive Committee of USPB as set forth herein and shall be paid promptly after it is determined. All determinations to be made by the Executive Committee pursuant to this section shall be made in its discretion.”³

A subsection of section 2.2 provided:

“**A. Performance Bonus.** Employee shall be paid an additional amount of incentive compensation based upon achieving results concerning increases and improvements with respect to potato and potato product marketing, consumption and demand The following goals and objectives shall be considered by the Executive Committee in determining the amount of incentive compensation that will be awarded.”

The third employment contract was dated April 1, 2016. It provided for “**Base Compensation**,” in an annual amount, payable in monthly installments; the language used was virtually the same as the language used in the 2015 contract to describe “**Base Compensation**.” The 2016 contract also provided for a performance bonus, in language virtually identical to that of section 2.2(A) of the 2015 contract. The 2016 contract omitted section 2.2, “**Incentive Compensation**.” Witness testimony indicated the contract combined the former monthly salary with the former annual incentive compensation, because both were guaranteed and there was no reason to separate them.

Wife argues the trial court misread the contracts. She contends there was only one reasonable construction of the contracts. Looking at the 2013 contract, she asserts the “Annual Incentive” section set out the “[f]irst year incentive” compensation, then

³ The NPPB was formerly known as the United States Potato Board (USPB).

provided for “[a]dditional bonus compensation.” She contends “additional” is defined as “ ‘[a]dded, extra, or supplementary to what is already present or available,’ ”⁴ and describes more of something that already exists. She concludes the only reasonable interpretation of “[a]dditional bonus,” is that the compensation described prior to that reference (i.e., “[f]irst year incentive”) is also “bonus” compensation.

She analyzes the 2015 employment contract in a similar manner. Section 2.2(A) describes “**Performance Bonus**” as “an additional amount of incentive compensation.” From this, she concludes the terms “bonus” and “incentive” are used interchangeably.

We disagree that her interpretation of the contract language is the only reasonable interpretation. The term “[a]dditional bonus compensation,” as used in the 2013 contract, could be construed to mean additional compensation in the nature of a bonus, which might be added to husband’s other compensation. Under this interpretation, the “[f]irst year incentive” and the “bonus compensation” would be subsets within the category of “Annual Incentive.” They would be two separate types of compensation, the first “to be paid” regardless of performance, and the second “may be paid” if husband met agreed-upon performance objectives.

In the 2015 contract, section 2.1 set out husband’s “**Base Compensation**,” stated as an annual figure, payable in monthly installments of a specified amount. Section 2.2 set out the “**Incentive Compensation**,” providing that, in addition to the base compensation set out in section 2.1, husband “shall be paid additional, incentive compensation.” Under wife’s definition of “additional,” husband’s base compensation would be incentive compensation, because the “additional, incentive compensation” referred to in section 2.2 could only be “additional” if the compensation in section 2.1 were also incentive compensation.

⁴ Wife cites Oxford Online Dictionary. (Oxford English Dict. Online (2018) <<http://www.oed.com>> [as of May 28, 2019].)

Further, as in the 2013 contract, the annual incentive compensation described in section 2.2 and the “**Performance Bonus**” described in section 2.2(A) appear to be subsets of the category of “**Incentive Compensation.**” The term “bonus” does not appear to be used interchangeably with the term “incentive.”

Wife’s construction of the contract language also completely ignores the extrinsic evidence offered by the parties. The trial court initially found extrinsic evidence was admissible to assist it in determining whether the contract language was ambiguous, that is, susceptible to the meaning attributed to it by each party. Extrinsic evidence was introduced by both parties.

In connection with her request for enforcement of the spousal support order, wife presented some of husband’s pay statements, which reflected “Bonus” payments, and others that reflected “Incentive” payments. In accordance with her theory that the two terms were synonymous, wife asserted she was entitled to 30 percent of all husband’s bonus and incentive compensation. There was evidence, however, that the designation of “bonus” on husband’s pay statements was not accurate. It was simply a category used by the payroll company to distinguish husband’s annual payments from his monthly payments. In 2015, NPPB switched to a different payroll company, which used the term “incentive.”

Husband testified he was paid both monthly amounts of salary and an annual lump-sum amount designated as incentive. Both amounts were negotiated with and determined by the board of directors of NPPB and the human resources director prior to the beginning of the contractual year. Both amounts were included in the organization’s budget and approved by the USDA. Both amounts were guaranteed; he was not required to meet any additional conditions to receive them, other than remaining in his employment. If he had terminated his employment during the contractual year, he would have received a pro rata portion of the annual incentive compensation for the time worked. The NPPB’s executive administrator and director of human resources and the

chair of its board of directors confirmed the accuracy of husband's understanding of the compensation terms of husband's contracts with the NPPB. Additionally, they noted the executive committee's discretion, discussed in section 2.2 of the 2015 contract, was exercised by the executive committee prior to execution of husband's contract.

There was also evidence that the bonuses mentioned in the contracts (the "[a]dditional bonus compensation . . . based upon mutually-agreed performance objectives," provided for in the 2013 contract, and the "**Performance Bonus**," provided for in section 2.2(A) of the 2015 contract) were separate from the annual incentive compensation and were not guaranteed. The procedure for obtaining a performance bonus required that the employee request the bonus, the executive committee discuss it and make a recommendation to the administrative committee, the administrative committee approve it and make a recommendation to the USDA, and the USDA give final approval. It was a lengthy process that was never used to give husband a bonus.

The trial court construed the contracts in accordance with the extrinsic evidence presented by husband. Thus, it implicitly found the extrinsic evidence showed the contracts were susceptible to the meaning advocated by husband. Exercising our independent review, we agree with the trial court that the extrinsic evidence demonstrated the language of the employment contracts was susceptible to the meaning attributed to it by husband. Therefore, the contract language was ambiguous and extrinsic evidence was admissible to assist in interpreting its meaning.

III. Whether the trial court's interpretation was reasonable and supported by substantial evidence

When "the interpretation of the contract turns upon the credibility of conflicting extrinsic evidence which was properly admitted at trial, an appellate court will uphold any reasonable construction of the contract by the trial court." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913.) The parties presented conflicting evidence concerning whether particular items of compensation described in husband's employment contracts

constituted a “bonus.” Wife presented evidence of pay statements, in which the employer referred to certain payments as “Bonus” or “Incentive.” Husband presented his own testimony, and that of the employer’s personnel, concerning their negotiation of husband’s compensation, their understanding of the terms “bonus” and “incentive” as used in the contracts and the pay statements, and the subsequent conduct of the parties, that is, the manner in which husband was actually compensated under the contracts. Because the extrinsic evidence was conflicting, we will uphold the trial court’s construction of the terms used in husband’s employment contract if it is reasonable and supported by substantial evidence. (*Winet, supra*, 4 Cal.App.4th at p. 1166.)

The March 24, 2011 spousal support order required husband to pay wife “\$4000 per month as spousal support” and “30% of the gross amount of any bonus he receives until further order of the court.” The order did not contain a definition of the term “bonus.” At the time the order was entered, husband worked for a different employer than he did at the time of wife’s request for enforcement of the support order. His compensation from the prior employer consisted of a monthly salary plus a potential for an annual bonus, that apparently depended, at least in part, upon the employer’s performance and ability to pay. Husband declared that no bonus had been paid that year and there probably would be none the next year. Thus, the bonus contemplated at the time the order was made was a potential, discretionary annual bonus. It was similar to the “annual bonus” in issue in *In re Marriage of Minkin* (2017) 11 Cal.App.5th 939 (*Minkin*).

In *Minkin*, the trial court interpreted the term “ ‘annual bonus,’ ” as used in the parties’ marital settlement agreement, which was incorporated into the judgment of dissolution. (*Minkin, supra*, 11 Cal.App.5th at pp. 942, 947.) The term was not defined in the agreement, and the court found it was ambiguous. (*Id.* at pp. 948-949.) Evidence of the circumstances surrounding the making of the agreement indicated that, at the time the agreement was made, the husband’s compensation included two components: a

salary and an annual performance bonus, which was not guaranteed. (*Id.* at p. 949.) The parties understood the husband's bonus was a discretionary payment by his employer, based on the husband's or the employer's performance. (*Ibid.*) Further, the parties referred to the provision requiring the husband to pay the wife a portion of the annual bonus as an “ ‘*Ostler/Smith* provision.’ ” (*Ibid.*) The court described such a provision as: “ ‘an additional award, over and above guideline support, expressed as a fraction or percentage of any discretionary bonus actually received.’ [Citations.] Its purpose is to capture fluctuations in the supporting spouse's income that are not included in a flat rate amount of support. . . . Case law justifies an *Ostler/Smith* award ‘on the ground that future bonuses are not guaranteed, and it would be unfair to require the obligor to file motions for modification every time a bonus is reduced [or denied].’ ” (*Ibid.*)

Wife contends amounts referred to in husband's employment agreements as “incentive compensation,” and amounts referred to in his pay statements as “Bonus” or “Incentive,” all constituted a “bonus.” Accordingly, she asserts she was entitled to 30 percent of those amounts under the support order. Wife does not challenge the sufficiency of the evidence to support the trial court's findings of fact. Rather, she argues the trial court's construction of the employment contracts was unreasonable.

The trial court heard testimony from both parties to the employment contracts concerning their intent and understanding of the compensation provisions of the contracts. Additionally, it received evidence regarding how husband was actually paid under those contracts. Based on the evidence received, the trial court made the following findings:

“The Court finds that the monthly compensation set forth in the employment contracts equals the total amount of compensation received by [husband]. The testimony of Ms. Brown (Human Resources) and Mr. Jensen (Executive Board) confirmed that the intent of the contracting parties was that the total amount reflected in the contract was guaranteed income to [husband]. The Court finds that there is significant evidence to support that this was not bonus income, but it was a compensation package

that was guaranteed and accrued monthly to Mr. Richardson. Additionally, there was testimony with regard to how he would have to proceed if he were to get a bonus, and based on the evidence it was clear to the Court that [husband] did not receive bonus income.”

A. June 19, 2013 contract

The 2013 contract contained the following provision concerning annual incentive compensation:

“First year incentive to be paid at six month anniversary and at the end of the year guaranteed at \$134,800 total. Additional bonus compensation may be paid based upon mutually-agreed performance objectives.”

Wife contends the only reasonable interpretation of this language is that the words “[a]dditional bonus compensation” in the second sentence relate back to the previous sentence, so that the compensation described in both sentences is “bonus compensation.” However, as discussed previously, the bonus compensation contemplated by the support order was a potential, discretionary annual bonus. The incentive compensation described in the first sentence of this provision was “to be paid” at specified times, and “guaranteed” in a certain amount. In contrast, the second sentence, relating to “bonus compensation” was discretionary (“may be paid”). Consistent with this language, the testimony of both husband and the chair of the NPPB board was that the incentive compensation was guaranteed, accrued monthly, and was not dependent on meeting any performance objectives or other conditions. They also testified there was a formal procedure to follow for the performance bonus, and husband never requested or obtained such a bonus.

In light of the contract provisions and the testimony, the trial court’s interpretation of the 2013 contract – that the annual incentive compensation was not a bonus, but guaranteed income – was reasonable.

B. April 1, 2015 contract

Wife contends the language of the April 1, 2015 contract made the incentive compensation a discretionary bonus, like the bonus discussed in *Minkin*. The “additional, incentive compensation” was “not to exceed” \$139,518, which suggested the amount could be less. The amount “shall be based upon the evaluation of Employee by the Executive Committee.” Further, the determination of the amount was to be made in the discretion of the executive committee. Consequently, wife concludes, the incentive compensation was not guaranteed, but was a discretionary bonus.

The provision for incentive compensation, however, also stated that “Employee shall be paid additional, incentive compensation.” Husband testified the lump sum incentive compensation under the 2015 contract was a guaranteed part of his salary package, the same as under the original 2013 contract, and he received the amount stated in the contract. Although the 2015 contract language appeared to leave the amount of that compensation for later determination by the executive committee, husband and the NPPB personnel uniformly testified that incentive compensation in the amount stated in the contract was guaranteed at the outset, and there was no requirement that husband meet any performance objectives or other conditions in order to receive it. The executive board met and determined the amount before the contract was executed, and the incentive compensation was paid to husband in that amount, without further exercise of discretion. Additionally, in the 2016 contract, the NPPB cleaned up the language of the contract, because it was confusing; it eliminated the provision for incentive compensation, and included what had previously been designated as incentive compensation in husband’s base compensation.

“The overriding goal of contract interpretation is to give effect to the mutual intention of the parties at the time of contracting, ‘so far as the same is ascertainable and lawful.’ ” (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1240.) The words used in a contract generally are to be

understood in their ordinary and popular sense. (*Ibid.*) When a contract is ambiguous, however, its terms may be explained or supplemented by course of performance. (*Id.* at pp. 1240-1241.) Further, “ ‘when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.’ ” (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753.) The “ ‘practical construction placed upon the contract by the parties themselves . . . renders it immaterial to consider what might be the literal construction of its terms. Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions.’ ” (*Id.* at p. 754.) This rule “is predicated on the common sense concept that ‘actions speak louder than words.’ ” (*Ibid.*) The rule has been applied when no fraud or collusion was shown, the parties to the contract agreed on their intent, and the contract was challenged by a third party. (*Meadows v. Lee* (1985) 175 Cal.App.3d 475, 483-484.)

The parties to the 2015 contract testified to their understanding of its compensation terms. They testified husband was actually paid in accordance with that understanding. Consequently, the trial court’s interpretation of the compensation terms of the 2015 contract, which was consistent with the parties’ understanding and performance of those terms, was reasonable.

C. April 1, 2016 contract

The April 1, 2016 contract omitted the provision for incentive compensation and provided for only base compensation and a discretionary performance bonus. Wife does not challenge the finding that husband received no bonus compensation under this contract.

DISPOSITION

The order denying Jill P. Richardson's request for enforcement of the spousal support order is affirmed. Blair R. Richardson is entitled to his costs on appeal.

DETJEN, Acting P.J.

WE CONCUR:

PEÑA, J.

DE SANTOS, J.